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TESTIMONY SUBMITTED BY MEDIA CAPTIONING SERVICES

RE: MATTER OF CLOSED CAPTIONING AND VIDEO DESCRIPTION

MM DOCKET NO. 95-176
VIDEO PROGRAMMING

FEBRUARY 21, 1996

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Media Captioning Services is pleased to offer the following comments to the FCC, in response to your Notice of Inquiry. Media Captioning Services has unique perspectives on the current state and development of the closed captioning market. In order to understand our perspective, we would like to share some information about our background with the Commission. Media Captioning Services ("MCS") was founded in 1987, and was the first small, woman-owned business incorporated in the U.S to provide closed captioning services. MCS' primary specialty is realtime closed captioning. In 1990, MCS began closed captioning tests with CNN, and in February, 1991, we began closed captioning on CNN. It was CNN who gave us our first significant opportunity to provide realtime closed captioning on a national basis. We began captioning 365 hours in our first year, and we currently provide over 4,200 hours on CNN, during daytime, evening hours, weekdays and weekends. In January, 1996, we began captioning CNBC's daytime programming. Therefore, in calendar year 1996, we will caption over 7,000 hours of national news, sports, and talk programming. We believe this ranks us second in the industry in terms of realtime closed captioning we perform, so we have a unique perspective on the industry.

Our remarks are directed to selective areas of your inquiry.

Firstly, with respect to Part IV., "AVAILABILITY OF CLOSED CAPTIONING AND VIDEO DESCRIPTION," you note that cable programming appears to have far less closed captioning. It should be noted that the single-most important factor in providing closed captioning is the availability of funding. Closed captioning is regarded by most broadcast and cable networks as a variable cost -- a cost to be minimized, and one which is subject to being cut in budget cuts, or, held constant, at the minimum. The single-most important provider of funding for closed captioning has been the Department of Education. In competitions for funding national, morning, and evening news, up to 1990, in the priorities published in the Federal Register, cable programmers were not mentioned as being the subject of the priority for closed captioned funding. Up to 1990, the programming that received support through Department of Education funding has been national broadcast network captioning. The increase in cable programming being captioned paralleled the expansion of the priorities of various Department of Education programs, to include cable programmers from 1992 on. In fact, MCS was the recipient of two daytime programming awards from the Department, in competitions held in 1992 and 1995, which facilitated a significant increase in

daytime closed captioned television on CNN. With federal funding assistance from the Department of Education, closed captioning on CNN has increased from 365 hours per annum -- funded solely by CNN -- to over 4200 hours currently, with approximately 2892 hours funded through the Department of Education. The expansion in hours has also been partly a result of cost-efficiencies and price reductions by MCS, implemented over the past 5 years. We will address this in a later section on cost efficiencies.

The market for closed captioning services on a national basis, therefore, exhibits both distinct horizontal and vertical integration, in terms of services and service providers. Realtime closed captioning services have been provided on network television by a small number of firms, three (3), to be precise, (NCI, WGBH -- nonprofits --, and Vitac). Some principals of one or more of the above companies refer to themselves as "The Big Three" in public forums. With respect to funding, we estimate NCI has received, since 1979, over \$ 50 million in federal funding, and, WGBH, over \$ 10 million in Department of Education funding over the same period. The market structure in the provision of realtime closed captioning services can best be described as oligopolistic. The same aforementioned firms are also vertically integrated, providing off-line closed captioning services, captioning movies, commercials, industrial videos. The combined horizontal/vertical integration, coupled with a significant participation/access to federal funding by these firms, has created opportunities for dominating pricing and, in some respects, inhibited the development of an efficient, cost-effective market for closed captioning services. This may explain why off-line services, in particular, have been priced at \$ 1,000-\$1,500 per captioned hour.

Also, based on our experiences, the broadcast networks have had little incentive, up to 1992, to expand their use of closed-captioned vendors that they would support in seeking federal funds, based on their estimate of who would have the greatest likelihood of being successful in the funding process. In reality, this has had the effect, in the past, of keeping the prices high for closed captioning of realtime, and, perhaps, offline services.

Local broadcast news stations use teleprompter methods predominantly for providing closed captioning. Although there may be some justification in smaller markets, in most major markets, particularly where live coverage of local events is provided, the use of teleprompter techniques is a wholly inadequate substitute for the partial accessibility provided by such methods. We would strongly urge the FCC to be responsive to consumer complaints as to the partial access to news provided by local stations, using teleprompter techniques instead of realtime closed captioning. In assessing the type of captioning method used, the

FCC should determine whether the method of captioning used -- teleprompter or realtime -- is appropriate to the nature of the programming being captioned. For example, if the underlying programming; i.e., news, relies extensively on live interview coverage, then provision must be made to realtime caption these portions, or the entire broadcast, to ensure access.

V. COST OF CLOSED CAPTIONING AND VIDEO DESCRIPTION.

MCS believes the high cost of closed captioning, up through 1990, has been the primary reason that closed captioning services have not expanded to meet consumer demand. Up through 1990, there were primarily two nonprofit concerns who dominated the federal funding process. The following information, obtained under FOIA in 1990, will corroborate this perspective. In the national news grant awarded to WGBH/Caption Center in 1990, the Department of Education was paying WGBH \$575.90 per hour, with additional network private sector contributions amounting to \$ 287.60 per hour, for an effective cost of \$ 863.50 per hour of realtime closed captioning of national news and public information. At that time, representatives of CBS and NBC would not deal with MCS, noting historical relationships, and the desire to work with one company that had the capacity to service all of its captioned news hours. At that time, the funding awarded to WGBH was to provide for the captioning of 3,000 hours of national news/public affairs information programming on broadcast networks. In this award, WGBH subcontracted significant portions of the award -- all captioning on ABC to NCI, and NBC captioning to Vitac. In December, 1990, MCS offered its services to WGBH Caption Center to assist them in captioning coverage of the Gulf War buildup, and subsequent hostilities. We offered to do so at a price of \$ 250.00 per hour to the Caption Center, in an effort to provide additional realtime captioning support on war-related programming not captioned on the networks. We received no response to our pricing, nor an offer to provide captioning services. Also, in testimony provided to the House Subcommittee on Telecommunications in March, 1990 re. The Television Decoder Circuitry Act, the then-acting President of NCI, John Ball, under direct questioning by Congressman Markey re. the cost of closed captioning, hedged his response, noting several parties were billed, and, bottom line, did not respond directly to the question. Also, it has come to our attention that the House of Representatives had contracted services from NCI to caption C Span proceedings from 1993 through 1996 -- a minimum of 1200 hours per year -- at a price we hear to be \$59,500 per month, equating to \$ 595 per hour. We have not corroborated this, or the price on the extended contract commencing January, 1996; but, in any event, this pricing is far in excess of the true market price for realtime closed captioning services.

In assessing what should be the price for realtime closed captioning services, MCS considers the nature of the programming, (i.e., news, sports, length of time to prepare, realtime/script content) along with the volume of prospective captioning. In the above-mentioned pricing examples, the true measure of cost is the effective cost, defined as the government portion, plus the market/private sector portion. Without divulging the specifics of our pricing, we can assert to you that our effective price on national news programming is less than \$ 260.00 per hour. As a small, for-profit business, we have implemented cost-efficiencies, which include riding the technology curve, as pricing for high-performing systems has decreased in price. We believe we are a model of efficiency, and a successful example of a company that has made efficient utilization of federal funds, to provide a substantial increase in high-quality closed captioned hours. In this respect, we believe we are a highly successful illustration of how federal funds can be efficiently used by a for-profit private sector to expand access through closed captioning -- a true credit to the Department of Education -- and to the concept of re-engineering government, by relying on the talents and efficiency of small, high-technology based companies, such as Media Captioning Services.

We have described the supply of closed captioning services and market structure as oligopolistic, with 3 firms having a dominant position in providing on-line (realtime) and offline services. MCS, to date, does not provide extensive offline services. We understand there may be as many as 100 additional firms, ranging in size from 1 to 3 persons, to as large as 20. However, the market outside of the 3 above noted, which are both horizontally and vertically integrated, is highly fractured, and dominated by micro firms, with MCS as an exception. MCS has less than 20 persons to date. We find it interesting in your notice of inquiry that our company name is not included among service providers, even though we provide comprehensive realtime closed-captioning services on CNN and CNBC. We would be interested in knowing who is providing you with information, since our name/credit is displayed hourly on the closed captioning of both of the above networks.

In summary, there is a growing pool of talented realtime writers who may be able to provide broadcast captioning services, as demand increases. However, there may be only 500 people in this industry in the U.S., to date, who are providing a service which impacts on over 26 million viewers who have a need for closed captioning. The market, therefore, is not sufficiently competitive, or mature, to withstand the impact of a few firms having an oligopolistic -- or monopolistic -- position in the market, if all video programming is to be captioned by mandate, without implementing additional safeguards. We will elaborate on this in our response to section 35, Strategies to improve competition.

20. We believe incentives should be given to private sector sponsors to provide more closed captioning. Although difficult in a period of budgetary restraint, tax credits given to video programmers, who treat closed captioning as a cost, may be a positive incentive for programmers to expand closed captioning. Matching grant programs may not be the best solution, for several reasons. The first concern we have is that providing funding through such grant programs would not allow free-market forces to develop a strong competitive market for closed captioning services. Matched grant programs would favor nonprofit concerns, who already are substantially involved in providing substantially the same services as for-profit companies, with the attendant potentially negative antitrust impact on the market. We are concerned that nonprofit concerns will use their tax-favored position with matched grant programs to further enhance their monopolistic position in the provision of closed captioning services, and artificially inflate the cost of closed captioning services by controlling the funding sources, through such matched grant programs.

21. We believe that Department of Education funding should be maintained, at the minimum, through the implementation by the FCC of a schedule for full accessibility of video programming through captioning. We understand your agency will formulate a schedule of regulations for the implementation of closed captioning over an 18-month period. By definition, we infer this does not necessarily mean, at the end of 18 months, there will be a requirement in place for 24-hour-a-day captioning. We would appreciate clarification on this point. Absent such a requirement, if federal funding on current and prospective programs were to be eliminated prior to the implementation of a regulatory requirement from your agency, there is no assurance the current level of captioning provided by broadcast networks and cable programmers will be maintained. Both broadcast and cable programmers have tight budget parameters and finite funds for closed captioning. We have heard some broadcast programmers believe the federal government will not suspend funding for closed captioning, and, if this perception is true, there may not be contingency plans in their budgets for this possibility. We believe this is an illusion, that, in fact, should funding for closed captioning not be provided by Congress, the current level of captioned programming will diminish, until such time as you provide a specific requirement re. the amount/percentage, and an immediate requirement for making closed captioning accessible.

Conversely, there may be an increase in captioning from networks currently not making their programming accessible through closed captioning in this period, who anticipate the imposition of such mandatory requirements. In summary, your agency should move quickly to evaluate the spectrum of responses from consumers, service providers, programmers, and any affected party, to

implement, if that is your conclusion, a clear guideline to make closed captioning a requirement on all video programming. As a starting point, you should require all video programmers to maintain the percentage of their video programming currently captioned as of the date the Telecom Bill was signed into law.

VI. Market Incentives for Closed Captioning

To date, market incentives for closed captioning vary, based on the type of programming (news, sports, movies, commercials), the time such programming is aired, and the network such programming is aired on. From our experience, program-specific sponsorship of closed captioning, particularly news, is difficult. Corporate sponsors are difficult to find, choosing to sponsor commercials as their preferred medium. In certain large sma's, local news captioning has had some corporate sponsorship (Los Angeles), where the local corporate sponsor may wish to project a positive image in the community, as part of a media campaign. Corporate sponsorship, however, is spotty, and not consistent. Local news stations, as noted previously, in the overwhelming number of cases choose to use the teleprompter to provide captioning. Although the Television Decoder Circuitry Act was passed with the intent to maximize the availability of closed captioning, the issue of cost, and the inability of some video programmers to increase their captioning budget has limited the increase of closed captioning accessibility. Also, during the 1990 through 1996 period, broadcast networks have lost significant market share to cable companies. The dramatic increase in viewership of such premier networks as CNN, CNBC, TNT, ESPN, each of which reach in excess of 40 million subscribers, with programming 24 hours a day, may account for the fact that as a percentage of programming, cable has less of its programming captioned than broadcast networks. Cable, however, has shown, in our opinion, the fastest growth in providing accessibility through closed captioning. For example, CNN currently captions 48% of its total programming. The Department of Education provides funding on 2892 hours, or 32%, of CNN's overall programming. Media Captioning's high quality, cost-effective pricing to both the Department of Education and CNN has accounted for this rapid increase in captioning. This three-way partnership, between the Department, CNN, and our company has accounted for this rapid increase in accessibility, and proves the wisdom of funding small, for-profit companies who can provide cost-effective pricing to funders, whether that is the federal government and/or the programmer. In January, 1996, as a result of a competitive bid, we began captioning 8.5 hours per day of CNBC's weekday programming, which accounts for 25% of all CNBC's programming. As a result, MCS is continuing to grow, and will further increase its capacity for realtime captioning by 50% projected by the start of 4th quarter 1996 (10-1-96). We believe that the expansion of market share in realtime and offline services by nonprofit entities is not the most efficient method of increasing closed

captioning, and matched funding programs, as noted above, would not encourage the growth of a competitive marketplace for closed captioning services.

Also, we believe cost-effective pricing from quality providers has been the most efficient method of increasing closed captioning, and will attract corporate sponsors as well. Our success in attracting Bell Atlantic for sponsoring 780 hours of closed captioning on CNN is an example of this strategy.

27. Application of Mandatory Captioning.

We will address our comments to the application of mandatory captioning for video programmers who carry live programming. In general, programmers who control and distribute programming have more flexibility to build in the cost of captioning than either a small video programmer, producer, or a distributor (i.e., video store). While we believe total access through closed captioning on all video mediums is essential, there may be priorities based on the intrinsic cost, and impact of programming on health, welfare, and public safety that may help the Commission determine where such mandates should be in effect. As noted above, news programming during daytime hours has often been, from our experience, and in the experience of the Department of Education, the most difficult area of the day to find private sector funding for captioning. Video programming, such as syndicated programming and movies, where the cost of captioning is, arguably, a small percentage of the cost of production, and an even smaller portion of the revenue stream from syndication and royalties, should be captioned by the programmer/producer, since such costs can be passed along to the consumer. News has, reportedly, not been a profitable area for networks, and sponsors for nonprime-time captioned news on cable and broadcast networks have been difficult to find. The Commission may need to reach a determination, for example, in the case of cable, of what is a reasonable percentage cost per subscriber (cost as the percentage of programming and advertising return per subscriber) to assess whether the cost of captioning represents an undue burden. Where the video programmer is providing live programming for a large component of his video programming, the threshold for establishing undue burden for such a programmer might be higher than a programmer providing largely pre-programmed, scripted material.

For example, is a 2% cost factor of the combined subscriber based/advertising revenue for a cable operator too high for captioning, or should this percentage be higher if the content of the programming is live news, having an impact on the health, welfare, and safety of the market served? We believe the Commission should determine priorities (based on live programming content, size of market served, revenue of the programmer) to avoid numbers of programmers --

networks and cable -- from seeking relief under the undue burden/excess cost exemption of the Telecom Bill, which would impede the implementation of full accessibility provided for under the law.

29. We believe a balance must be struck between providing access through closed captioning, and the costs and burdens imposed by mandatory requirements. MCS has been able to offer cost-effective solutions by which major cable programmers (CNN and CNBC) can significantly expand closed captioning of their video programming. As noted above, the Commission should review comments to arrive at some indices of what constitutes an acceptable level of accessibility, encouraging video programmers to use cost-efficient realtime closed captioning providers to expand accessibility. We believe that this will have a positive impact on the market, as cost-efficient providers of captioning will have opportunities with newer programmers to provide closed captioning. In addition, standards implemented by the FCC with respect to the amount of closed captioning to be provided on a network, based on a reasonable schedule for implementation of full 24-hour accessibility, may not be met by as much resistance by video programmers seeking exemption on the basis of undue burden. If implementation requirements for closed captioning are too broad (i.e., 24-hour per day immediately), the effect on market pricing will not be positive, as demand exceeds supply, and programmers will have a reasonable case to seek, and, possibly, be granted, an exemption based on undue cost. This is essential to avoid an administrative deluge to the FCC from programmers seeking administrative relief from mandatory requirements for closed captioning, based on undue cost.

33. With respect to the issue of accuracy, the FCC should not enter the business of determining quality or standards of closed captioning. The marketplace is the best determinant, particularly when a station or programmer is paying with private sector funds, whether a captioning company is meeting the needs of the marketplace. When the consumer complains and the station is paying with its own funds, the problem will be corrected, or the station/programmer will make changes. The programmer or station will do so, if they are required by the FCC, to provide an amount and quality of captioning that is appropriate to the subject matter being captioned (i.e., realtime captioning for live news coverage). If a station does not serve the public interest and is subject to sanctions (loss or non-renewal of license), the prospective economic cost to such a station or programmer will cause it to be responsive to concerns about quality and accessibility. The FCC should not enter the business of defining the standards of quality assessment for closed captioning. Also, will the FCC rely on one or more vendors, or a group of companies, such as those in the nonprofit industry, who may consider themselves the self-styled arbiters of quality? There are too many

parties at interest who would devise standards to meet their objectives. Further, there are adequate professional certifications for individuals entering the closed captioning industry, extensive research conducted under the auspices of the Department of Education by qualified researchers, and exhaustive guidelines developed by the Department of Education for evaluation and quality-control assessment. Although it is not our intent to suggest additional administrative responsibilities for the Department, the Commission should note the Department, given its extensive funding involvement with closed captioning, would be a good source for information, which can be provided to the FCC, to identify information/research on standards for captioning, which can be obtained by interested providers and consumers of closed captioning.

34. We believe a transition to 24-hour-a-day captioning is essential for all programmers (of broadcast and cable programming) regardless of their current level of captioned programming. As noted above, programmers who impact on the public interest, through information that has an immediate impact on the general, educational, and health of interested consumers of closed captioning (news), should be subject to a more rapid transition to full 24-hour-a-day captioning, particularly if they serve a larger market. Video programmers with access to advertising and, in the case of cable operators, subscriber revenue, who impact nationally with their programming, might, ideally, have a percentage phase-in requirement, based on the cost per subscriber they project for captioning, and their progress, to date, in making their programming accessible. For example, if a programmer has been providing closed captioning for 10 years, has had a substantial portion of current programming captioned with federal assistance, (i.e., news or sports), the phase-in to 24-hour captioning for such a network may be faster than a smaller cable network, which has not had the opportunity to make cost allocations for a sizable amount of captioning, appropriate internal engineering/quality control monitoring, that a network with substantial involvement with captioning has had the time to implement. This approach may also encourage larger, more mature networks with substantial product to be captioned to look for cost-effective captioning providers, encourage competition in the provision of such services, and develop the market for closed-captioning services as video programmers seek cost-effective ways to increase the level of closed captioning on their video programs. Bottom line, the Commission should encourage all video programmers to emphasize cost-effectiveness in the selection of caption providers (not at the expense of quality) with the objective of increasing accessibility of their video programming through closed captioning.

35. We at MCS believe that market-based incentives -- encouraging video programmers to use smaller, for-profit (by definition, cost-effective) providers of

closed-captioning services -- will encourage faster compliance by video programmers to provide maximum accessibility to their video programming through closed captioning. We would encourage the FCC to use vigilance in this transition, to ensure that in this transition period the FCC put in place a more efficient mechanism to enforce federal antitrust laws. We have pointed out to your legal counsel that regulatory agencies charged with enforcement of antitrust laws, from our experience, often take a per se illegality vs. rule-of-reason approach to the application of such laws. This derives from not only political considerations (is it a high-profile litigation deserving agency resources?), but, as well as, an assessment of how "best" to use limited resources. We gather that means high-profile litigation, with the high likelihood of enforcement/conviction, using limited resources. Closed captioning's impact on a national audience, in our opinion, deserves greater regulatory oversight by those agencies entrusted with enforcement of antitrust laws.

In reality, we believe a rule-of-reason approach -- looking to the reasonableness of actions, and whether they violate existing antitrust laws, and, therefore, looking to the effect of restraint of trade and predatory pricing in their effect on competition in this industry -- should be the approach the FCC takes in working in conjunction with other regulatory agencies. We are fully aware of the role of the Department of Justice and FTC Bureau of Competition. We have been to the FTC to discuss in detail a predatory pricing proposal which was presented to an account of ours, with the intent of inducing our account to breach a contractual arrangement and seriously damage our business. Their (FTC) approach has been to defer action, unless harm can be demonstrated -- which was not the case in this instance -- since the predatory pricing scheme was rejected by our account. We believe, in the 18-month period during which time you will be formulating final schedules for the implementation of closed captioning, that stringent enforcement of antitrust laws may be necessary to avoid certain dominant companies in the industry from attempting to significantly increase their already large market share in the provision of realtime and offline captioning services. MCS believes the FCC should take the initiative in determining how anticompetitive practices in the closed captioning industry should be resolved, to lower prices, and maximize accessibility and compliance with the law. We are prepared to suggest, through normal constituent channels, additional authorities and methods in revisions to the Telecom bill to expand your enforcement authority, if appropriate.

In summary, Media Captioning Services, as a major realtime caption provider, believes market-based incentives -- efficient, cost-effective pricing from companies such as ours, and other, smaller companies -- that are capable of

providing the expanded amount of closed captioning, will have the intended benefit of dramatically increasing accessibility through closed captioning. In addition, your review of, and support for, federal funding programs of the Department of Education that are in effect, and which may be funded in fiscal 1996, which further improve the competitive structure of the marketplace (i.e., funding of smaller, for-profit companies) is one nonregulatory step to ensure that the marketplace among closed captioning providers will continue to develop, and that anticompetitive combinations of companies to expand market share and raise the price of closed captioning, giving programmers rights to seek exemption based on undue burden (cost), will not develop. In this manner, an orderly, efficient transition toward expanding overall accessibility toward fully-accessible programming through closed captioning will have a greater chance of success, and the true intent and goal of the Telecom Bill with respect to closed captioning will be realized.

We would be happy to provide you with additional information upon request.